

### REMARKS/ARGUMENTS

Entry of these amendments and remarks is respectfully requested in response to the communication of April 9, 2003. Entry of this amendment will place the claims in allowance or, in the alternative, place the application in a better condition for appeal.

Upon entry of this amendment, claims 1-4, 7, 8, 10-16, 19-27, 34-44, and 48-58 will be pending. Claims 9, 17, 18, 28-32, and 45-47 were cancelled, claims 1, 7-8, 10, 39-41, and 51 were amended, and claims 52-58 have been newly added to more distinctly claim the Applicants' invention. Support for these amendments and additions may be found throughout the specification, for example, at page 6, lines 32-33 and page 5, lines 4-7. Accordingly, no new matter has been added.

Preliminarily, it is submitted that a reexecuted oath is in preparation and will be submitted in due course.

Claims 7, 17-18, 29-30, 39-41, and 46-47 were rejected under 35 U.S.C. §112. The Applicants submit that the above amendments address this rejection, and that the submitted claims are fully compliant with §112.

Claim 51 was objected to under 37 CFR 1.75(c) as being in improper dependent form. Applicants submit that the above amendments fully address this objection and respectfully request it's withdrawal.

Claims 1-4, 9, 14, 16, 19, 22, 26-27, 36-37, 39, and 43-44 stand rejected under 35 U.S.C. §102(b) as anticipated by CA 2,188,331 ("FMC CA"). The Applicants respectfully submit that the claims, as amended, are free of the cited art for at least the following reasons.

FMC CA discusses reduced-fat shortenings obtained from emulsions of a lipid phase and an aqueous phase. Seeking a shortening that "provides the physical and sensory characteristics of conventional shortening in high fat bakery products"<sup>1</sup>, this reference notes that "preferred emulsion compositions of this invention *have a plastic or solid consistency*".<sup>2</sup> To achieve this goal, FMC CA discusses emulsions with emulsifiers in the range of "about 1

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<sup>1</sup> Canadian Patent Application 2188331, page 4, lines 14-15

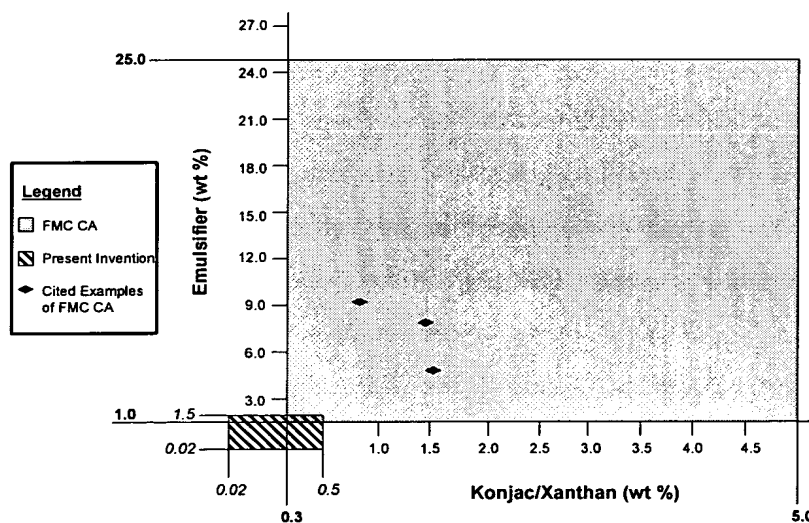
<sup>2</sup> Canadian Patent Application 2188331, page 4, lines 28-29 (*emphasis supplied*).

weight % to about 25 weight %”<sup>3</sup>. Similarly, FMC CA discusses using 0.3 – 5 weight % of “konjac as a gelling agent”<sup>4,5</sup>

In contrast, the presently claimed invention is directed towards a cosmetic oil-in-water emulsion in the form of a *milk or cream* employing low amounts of emulsifiers (0.02 to 1.5 weight %) and polysaccharide combinations (0.02 to 0.5 weight %).

We respectfully traverse the rejection of the claims as the art relied on by the Examiner fails to disclose the claimed subject matter with sufficient specificity to constitute anticipation under 35 U.S.C. §102. Specifically, the Examiner’s attention is directed to MPEP §2131.03 (excerpted below) and Figure I which graphically represents the difference between the currently claimed invention and FMC CA.

When the prior art discloses a range which touches, overlaps or is within the claimed range, but no specific examples falling within the claimed range are disclosed, a case by case determination must be made as to anticipation. In order to anticipate the claims, the claimed subject matter must be disclosed in the reference with “sufficient specificity to constitute an anticipation under the statute.” What constitutes a “sufficient specificity” is fact dependent.<sup>6</sup>



**FIGURE 1**

<sup>3</sup> Canadian Patent Application 2188331, page 13, lines 20-21.

<sup>4</sup> Canadian Patent Application 2188331, page 6, line 13.

<sup>5</sup> Canadian Patent Application 2188331, page 4, line 24.

<sup>6</sup> MPEP §2131.03

Despite it's recitation of broad ranges, FMC CA only exemplifies large amounts of emulsifiers and konjac/xanthan polysaccharides. It is particularly worth noting that the examples of FMC CA cited by the Examiner (*i.e.*, examples 5, 6 and 8E) illustrate the use of 5.1 to 9.1 weight % emulsifier and approximately 0.8 to 1.5 weight % konjac/xanthan.<sup>7</sup> In contrast, a study of the Examples in the current application shows that stable emulsions were obtained with far less of both ingredients. For instance, Example 2 (pp 24-25), reveals that stable milk emulsions were obtained with as little as 0.06 weight % polysaccharide combination and 0.05 weight % emulsifier (*see* claims 38, 43, 54, 56, and 58). This difference is not surprising considering FMC CA's goal was to make a substance that resembled Crisco<sup>®8</sup>, which hardly seems like it would make a good hand cream.

Standing partially under FMC CA's broad umbrella of ranges is a novel invention for a cosmetic or personal care composition and FMC CA didn't describe it with sufficient specificity to prevent the Applicants from claiming it now. Therefore, the Applicants respectfully request reconsideration and withdrawal of this rejection.

The 35 U.S.C. §103(a) rejections of claims 28-32 over Modiszewski *et al.* (US 5,498,436); claims 28-29 and 31-32 over Sewell *et al.* (US 5,624,612) in view of FMC Corporation, WO 93/02571 ("FMC WO"); and claims 28-32 and 45 over Imperial Chemical Industries PLC, WO 96/31187 ("ICI") in view of FMC WO in further view of Sewell are rendered moot in view of the cancellation of these claims.

Finally, claims 1-4, 7-27, 34-44 and 46-51 stand rejected as obvious over ICI in view FMC WO. The Applicants assert that the above amendments and arguments fully address this rejection. Specifically, neither ICI or FMC WO, alone or in combination, teach all the elements of the claimed invention, such as the use of 0.02 to 1.5 weight % emulsifier.

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<sup>7</sup> These values were calculated from the disclosed weight of the given emulsifier or polysaccharide combination and total mass in the examples cited by the Examiner. For example, Example 5 shows 34g of emulsifiers used in a mixture with a total mass of 659g (Crisco, emulsifiers, tetrasodium pyrophosphate, water, and a konjac/xanthan mixture). Accordingly,  $(34/659) \times 100$  yields the weight percentage of emulsifier in Example 1, in this case 5.1%.

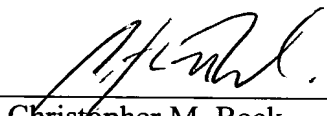
<sup>8</sup> See, *e.g.*, Example 8 of FMC CA which produces several emulsions from Crisco<sup>®</sup>, and then uses them to bake a yellow cake.

Therefore, it is believed that the present application is in condition for allowance and favorable reconsideration and allowance of the application is kindly requested.

Should any issues remain unresolved, the Examiner is encouraged to contact the undersigned attorney for Applicant at the telephone number indicated below in order to expeditiously resolve any remaining issues.

Respectfully submitted,

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